

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

JEANA M. REED

Case No. 03-17629

Debtor(s)

APPEARANCES:

EDWIN M. ADESON, ESQ.
Attorney for Debtor
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Glens Falls, New York 12801

MATTHEW SGAMBETTERA, ESQ.
Attorney for USR Group
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DIERDRE A. MARTINI
United States Trustee
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Assistant United States Trustee

EHRlich HANFT BAIRD & ARCODIA
Attorneys for Trustee
64 Second Street
Troy, NY 12180

Marc S. Ehrlich, Esq.
Trustee

Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION

Currently before the court is the motion of Jeana M. Reed (“Debtor”) to convert her case from chapter 7 to chapter 13. Opposition has been filed by Marc Ehrlich, Esq. the Chapter 7 Trustee (“Trustee”). The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(A) and 1334(b).

FACTS

Based upon the pleadings submitted, the court finds the following:

- 1) The Debtor filed her chapter 7 petition on November 14, 2003.
- 2) On Schedule A, the Debtor lists a fee simple interest in a single family residence located at 22 Robins Run, Gansevoort, New York (the "Residence"), valued at \$83,000.
- 3) On Schedule D, the Debtor lists M&T Mortgage Corporation as the holder of a first mortgage against the Residence in the amount of \$79,184.63.
- 4) The Debtor was issued a discharge on February 4, 2004.
- 5) The Trustee received an offer to purchase the estate's interest in the Residence from USR Group, Inc.
- 6) On May 26, 2004, the Trustee filed a motion to approve the sale of the estate's interest in the Residence based upon USR's offer.
- 7) The Debtor filed opposition to the Trustee's motion on June 15, 2004. On June 15, 2004, the Debtor also filed the instant motion to convert her case to a Chapter 13.

ARGUMENTS

Relying upon *In re Marcakis*, 254 B.R. 77 (Bankr. E.D.N.Y. 2000), the Trustee argues that despite the express language of 11 U.S.C. § 706(a) the Debtor does not have an absolute right to convert, and the court may exercise discretion in deciding a debtor's request to convert. Additionally, the Trustee asserts that the Debtor's request to convert should be denied because the Debtor will not be able to satisfy the confirmation standards of § 1325(a)(4) and (a)(6)¹ in

¹ Section 1325 states in relevant part:

(a) [T]he court shall confirm a plan if -

.....

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

....

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

that she is not in a position to pay into a plan.

In support of her motion, the Debtor states that she has a disabled son and simply wants to keep her home. She further indicates that she has reduced her expenses which will allow her to propose a confirmable chapter 13 plan.

ISSUE

Whether the Debtor has an absolute right to convert her case from chapter 7 to chapter 13 pursuant to § 706(a).

DISCUSSION

The court recently addressed the issue raised in this case in *In re Carrow*, Case No. 02-17838 (September 8, 2004).² Looking to the express language of § 706, this court held that a debtor has the right to convert from chapter 7 to chapter 13 as long as (1) the debtor's case was not previously converted, and (2) the debtor is eligible for chapter 13. *Id.* ; *See* 11 U.S.C. § 706 (a),(d). As such, the court respectfully declined to follow *Marcakis*.

The Trustee has not asserted that either (1) the Debtor's case has been previously converted, or (2) the Debtor is not eligible for chapter 13 pursuant to § 109. Because no objections were raised, the court assumes these two conditions have been met. As such, the court finds no impediment to the conversion of the Debtor's case to chapter 13. Any confirmation issues regarding plan feasibility or the liquidation test pursuant to § 1325(a)(4) and (a)(6) are preserved and may be addressed post-conversion.

CONCLUSION

Based upon the foregoing, the Debtor's case is converted to chapter 13, and a chapter 13

²The court assumes familiarity with the *Carrow* decision.

trustee shall be appointed. The Debtor's counsel shall submit an order in conformance with *Carrow*, and this decision.

Dated: September 9, 2004

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge